Supreme Court, U.S.
FILED

(1) 96 920 NOV 23 1996

No.

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In The

# Supreme Court

of the United States

October Term, 1996

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JEAN PIERRE FREY,

*Petitioner,*

*v.*

BANK ONE, INDIANAPOLIS, N.A., AN INDIANA CORPORATION,

*Respondent.*

*On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit*

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## PETITION FOR WRIT OF CERTIORARI

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38 pp

## QUESTION PRESENTED

**Did the Court of Appeals err when it affirmed the decision of the District Court granting Defendant's Motion For Judgment on the Pleadings despite the existence of an issue of fact as to the date upon which the applicable Statute of Limitations began to run?**

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---

## PETITION FOR WRIT OF CERTIORARI

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The petitioner, Jean Pierre Frey, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above entitled proceedings on July 31, 1996.

## OPINIONS BELOW

The opinion and judgment of the Seventh Circuit Court, of Appeals, dated July 31, 1996 was not reported. A copy of the opinion is reproduced in the Appendix at p.1a. The Entry and Judgment of the United States District Court for the Southern District of Indiana dated November 16, 1995 was not reported. A copy of the Entry and Judgment is reproduced in the Appendix at p. 7a. The Order of the Seventh Circuit Court of Appeals denying Plaintiff-Appellant's Petition for Rehearing was entered August 28, 1996. A copy is reproduced in the Appendix at p. 18a.

## JURISDICTIONAL STATEMENT

**On July 31, 1996, the U.S. Court of Appeals for the Seventh Circuit entered its opinion and judgment affirming the final judgment of the U.S. District Court for the Southern District of Indiana, Indianapolis Division. On August 28, 1996, the U.S. Court of Appeals for the Seventh Circuit entered its order denying Plaintiff-Appellant's Petition for Rehearing.**

**The jurisdiction of the Court to review the judgment of the Seventh Circuit Court of Appeals is invoked pursuant to 28 U.S.C. § 1254(1).**

## STATUTE INVOLVED

**Indiana Code § 34-1-2-2**

## STATEMENT OF THE CASE AND FACTS

In February of 1990, Plaintiff-Appellant, Jean Pierre Frey, closed out a number of accounts with Bank One, Indianapolis, NA which included one which he held jointly with one Antonio Ferrari. In June of 1990, Ferrari fraudulently reactivated the account which he had, prior to this time, held jointly with Mr. Frey. Between the period of June 29, 1990 and August 13, 1990, Ferrari transferred a total of $1,259,779.14 belonging to Mr. Frey from Frey's account with a Florida bank (Banca Nazionale del Lavoro or "BNL") to the reactivated Bank One account.

Plaintiff commenced an action in state court in Dade County, Florida, case NO. 92-23709CA-25, entitled *Jean Pierre Frey v. Banca Nazionale del Lavoro and Antonio Ferrari*. During the course of the BNL lawsuit, Plaintiff had an opportunity to depose some of Bank One's personnel in connection with the fraudulent transfer. It was during the course of the depositions of Jacqueline Akers and Ruth Dickinson on September 20, 1993 that Plaintiff first learned that Bank One had violated some of its own internal procedures in handling the transfer which aided and permitted Antonio Ferrari in the perpetration of his fraud. (See Dep. excerpts, Jacqueline Akers, Ruth Dickinson attached as Exhibits 1 and 2 to Plaintiff's Response Brief, App. pgs. 23, 43)(See also, Complaint, App. p.19a-22a). Prior to this time, this negligent conduct by Bank One's was unknown to Plaintiff.

On September 27, 1994, Plaintiff-Appellant commenced the present action . (19a) On August 9,

1995, Defendant-Appellant filed a Motion for Judgment on the Pleadings asserting that Plaintiff's cause of action was barred by the statute of limitations. Ind. Code Sec. 34-1-2-2. An appeal to the Seventh Circuit followed.

On July 31, 1996, the Seventh Circuit issued its opinion in the present case. (1a) Plaintiff-Appellant filed a Petition for Rehearing pursuant to Rule of the Federal Rules of Appellate procedure. The petition was denied by the Seventh Circuit on August 28, 1996. (18a) The present Petition for Writ of Certiorari followed.

## REASONS FOR GRANTING THE WRIT

1. Under the doctrine outlined in *Wehling v. Citizens National Bank*, 586 N.E. 2d 840 (Ind. 1992), the statute of limitation in an action does not begin to run until the plaintiff knew or, in the exercise of ordinary diligence, could have discovered that an injury had been sustained as a result of the tortious act of another. The Writ of Certiorari should be granted, as the negligent act of Bank One could not have been discovered through ordinary diligence, unlike the situation outlined in *Hatcher v Haupert*, 655 N.E. 2d 1229 (Ind.Ct.App. 1995). The decision of the lower court in this matter constitutes a departure from Indiana law and requires the exercise of this Court's authority.

This case involves the statute of limitation contained within Ind. Code § 34-1-2-2(1) and the discovery rule stated within *Wehling v. Citizens National Bank*, 586 N.E. 2d 840, 843 (Ind.. 1992). The discovery rule contained within Wehling states that an action accrues when "ordinary diligence could have discovered that an injury had been sustained as a result of the tortious conduct of another." *Wehling* 586 N.E. 2d at 843. See also, *Hatcher v. Haupert*, 655 N.E. 2d 1229, 1230-1 (Ind.Ct.App. 1995)("Once Haupert's alleged negligence and resulting damage were susceptible of ascertainment by Hatcher, the limitation period began to run.")

However, another aspect of the discovery rule is the proposition that summary judgment on the expiration of the statue of limitations is inappropriate

where a question of fact exists as to when the plaintiff knew of could have discovered that an injury had been sustained as a result of the tortious act of another. *Malachowski v. Bank One, Indianapolis*, 541 N.E. 2d 306, 308 (Ind.Ct. App. 1992), *Page v Hines*, 594 N.E. 2d 485, 487 (Ind.Ct.App.1992).

In the present case, the Court has not given consideration to the fact that Bank One's negligent act was neither known to Mr. Frey, nor was it ascertainable by ordinary diligence until it was actually discovered during the course of the BNL litigation. Mr. Frey received the statements of his accounts in August which disclosed the existence of the injury and the action of Antonio Ferrari. However, the negligent act by Bank One (the fact that its processing of this request did constitute negligence) was not discoverable until Mr. Frey was informed of the Bank's internal policies and their violation during the BNL depositions.

As is stated in the *Wehling* case, both the injury and the negligent act must be discoverable with the exercise of ordinary diligence. In the *Hatcher* case, although the court held that the Commissioner's filing of the rehabilitation action against Mutual Life provided notice that Mutual Life was in difficulty, plaintiff admitted that he had knowledge of the rehabilitation proceedings. *Hatcher*, 655 N.E. 2d at 1230-31. In the present case, there is, at the very least, a question of fact as to whether or not the negligence of Bank One was ascertainable in the exercise of ordinary diligence. If a question of fact, does exist, then the case is not an appropriate one for summary disposition. *Page*, 594 N.E. 2d at 487.

## CONCLUSION

**For the reasons stated above, Petitioner, Jean Pierre Frey, requests the issuance by this Court of a Writ of Certiorari tot the United States Court of Appeals for the Seventh Circuit.**

**Respectfully Submitted,**

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In the

# United States Court of Appeals

For the Seventh Circuit

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No. 95-3981

JEAN PIERRE FREY,

*Plaintiff-Appellant,*

*v.*

BANK ONE,

*Defendant-Appellee.*

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Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division. No. 94 C 1432--Sarah Evans Barker, *Chief Judge.*

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ARGUED JUNE 11, 1996--DECIDED JULY 31, 1996

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Before CUDAHY, KANNE, and DIANE P. WOOD, *Circuit Judges.*

KANNE, *Circuit Judge.* Jean Pierre Frey jointly owned a bank account with Antonio Ferrari at Bank One in Indianapolis. That account was closed in February, 1990. Frey alleges that Ferrari reopened the Bank One account in June, 1990, fraudulently transferred $1,259,779.14 from Frey's account with Banca Nazionale del Lavoro (BNL) from June 28, 1990, until August 13, 1990, and then deposited the

money into the Bank One account. Frey first brought an action against BNL and Ferrari; then, after learning about Bank One's involvement, brought this action against Bank One for negligently permitting the fraudulent transfer of funds. The district court granted judgment for Bank One on the pleadings pursuant to Fed. R. Civ. P. 12(c) finding the suit was time-barred by Indiana's two year statute of limitations. See Ind. Code sec. 34-1-2-2(1) (two year limitation on all tort claims for injury to personal property) (1992). On appeal, Frey disputes the timing of when the cause of action accrued. "We review a motion pursuant to Rule 12(c) under the same standard as a motion to dismiss under Fed. R. Civ. P. 12(b). Accordingly, the motion should not be granted unless it appears beyond doubt that the plaintiff cannot prove any facts that would support his claim for relief. In evaluating the motion, we will view the facts in the complaint in the light most favorable to the nonmoving party." *GATX Leasing Corp. v. National Union Fire Ins. Co.,* 64 F.3d 1112, 1114 (7th Cir. 1995) (citations omitted).

Indiana law, which governs this case, employs the discovery rule in all tort cases to determine the accrual date of an action. An action accrues and the statute of limitations begins to run when "the plaintiff knew or, in the exercise of ordinary diligence, could have discovered that an injury had been sustained as a result of the tortious act of another." *Wehling v. Citizens National Bank,* 586 N.E.2d 840, 843 (Ind. 1992); *see also City of Hobart Sewage Works v. McCullough,* 656 N.E.2d 1185, 1189 (Ind. Ct. App. 1996) (action accrued when plaintiffs discovered injury). This case centers on when Frey garnered

sufficient information that he should have known that his injury was caused by another. On August 4, 1992, Frey requested that BNL deliver a statement of all of his accounts. From these statements, Frey learned that the money had been transferred to Bank One. The district court found that his action accrued then because the BNL statements showed that Bank One had accepted unauthorized wire transfers for more than one million dollars from his BNL account and that Bank One had deposited the transfers into the account he believed was closed.

Frey argues on appeal that his action did not accrue until September 20, 1993, when, pursuant to his action against BNL and Ferrari, he deposed officers from Bank One. The wire transfers from BNL to Bank One had transposed Frey's first and middle name ("Pierre Jean Frey" instead of "Jean Pierre Frey"). During the deposition, Frey learned that Bank One had internal procedures governing the acceptance of money transfers and that these procedures may have been violated. When the information on the wire transfers do not match the bank's central information file (for instance, the information lists the wrong name), then Bank One either returns the money or requests further instructions from the issuing bank. The money is not deposited into the account until the information is confirmed. However, when wire transfers come in with transposed letters or names but with correct account numbers, Bank One relies on the discretion of the operator whether to deposit the money or return the funds to the issuing bank. Frey believes that Bank One violated its internal policy by depositing the money into Frey's account because the name on the wire transfer did not match his name in the central information file.

Further, Frey admits that he knew of his injury in August but contends that until this September deposition, he did not know that Bank One had handled his account negligently.

This argument misstates the law of Indiana. Indiana does not require that a plaintiff uncover the legal theory for holding a defendant liable for the action to accrue. Rather, the plaintiff must only be aware that the defendant caused him injury. See *Madlem v. Arko*, 592 N.E.2d 686, 687 (Ind. 1992) (action accrued when plaintiff learned that the signature on the mortgage was forged); *Habig v. Bruning*, 613 N.E.2d 61, 64 (Ind. Ct. App. 1993) (warranty action accrued when plaintiffs discovered that defendant's construction had injured the structural integrity of their home); *Chaiken v. Eldon Emmor & Co.*, 597 N.E.2d 337, 343 (Ind. Ct. App. 1992) (action accrued when plaintiffs discovered that defendant had converted stock).

This principle is exemplified in *Hatcher v. Haupert,* 655 N.E.2d 1229, 1230 (Ind. Ct. App. 1995). Hatcher was the trustee of a retirement plan that purchased a single premium annuity contract issued by Mutual Security Life Insurance Company. Haupert was the agent for the retirement plan when the contract was purchased. On October 5, 1990, the Commissioner of the Indiana Department of Insurance issued a filing that Mutual Life was in serious financial troubles and required financial rehabilitation proceedings. On August 7, 1992, Hatcher was notified that the fund was insured for only $100,000 because the retirement plan listed only a single annuitant. Hatcher filed his suit on March 15, 1994. Under Indiana's two year statute of

limitations, his action was time-barred unless it accrued after March 15, 1992.

The court found that Hatcher's claim that Haupert had breached his duty by listing the fund under a single annuitant was not time-barred because, until the August 1992 notice, Hatcher could not have discovered that the fund was listed under a single annuitant. In other words, Hatcher had no inquiry notice of that injury until the August notification.

However, the court found time-barred Hatcher's claim that Haupert breached his fiduciary duty by failing to inform Hatcher that Mutual Life was in financial straits. The court reasoned that the October 1990 filing by the Commissioner gave Hatcher inquiry notice that Haupert had caused an injury. "With [knowledge of the October filing,] Hatcher could discover, through the exercise of ordinary diligence, that Haupert's alleged negligent act of failing to inform Hatcher of Mutual Life's financial troubles would result in damage to the Retirement Plan. Once Haupert's alleged negligence and resulting damage were susceptible of ascertainment by Hatcher, the limitation period began to run." *Id.* at 1230-31.

Here, the August statements informed Frey that Bank One had received the fraudulent money transfers. Had Frey exercised ordinary diligence, Bank One's alleged negligence and resulting damage were ascertainable. Therefore, the statutory period began to run.

In his appellate brief, Frey mis-cites several Indiana cases for the proposition that the statute of limitations begins to run "only when a plaintiff can connect the injury complained of to a wrongful act." Brief at 7. However, *Wehling* specifically states that the action accrues when "ordinary diligence could have discovered that an injury had been sustained as a result of the tortious conduct of another." *Wehling*, 586 N.E.2d at 843 (emphasis added). There is no requirement that the plaintiff link the injury to a wrongful act, only that ordinary diligence could have discovered such a link. For instance, in *Hatcher*, even though Hatcher had not yet gathered sufficient facts to realize that Haupert negligently had failed to inform him that Mutual Life was financially unstable, Hatcher had enough information to create inquiry notice that, with ordinary diligence, he would have discovered the needed facts. Therefore, Hatcher's claim was time-barred.

Similarly, in August, 1992, Frey learned that Bank One was involved in Ferrari's scheme although Frey had not learned how Bank One was involved. That knowledge created the duty to further inquire into Bank One's role. Ordinary diligence would have unearthed Bank One's role and the alleged "wrongful act." Therefore, Frey's action is barred by the statute of limitations because his action accrued when he received the BNL statements in August, 1992.

AFFIRMED.

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*Clerk of the United States Court of Appeals for the Seventh Circuit*

United States District Court
Southern District of Indiana
Indianapolis Division

JEAN PIERRE FREY,
*Plaintiff,*

*vs.*

BANK ONE,
*Defendant.*

ENTRY

Jean Pierre Frey ("Plaintiff") filed a complaint against Bank One, Indianapolis, N.A. ("Bank One") on September 27, 1994 for damages arising from Bank One's alleged negligence in permitting a fraudulent transfer of funds. The matter is before the Court on Bank One's motion, pursuant to Federal Rule of Civil Procedure 12(c). for judgment on the pleadings. For the following reasons, the Court grants Bank One's motion.

I. STANDARD

A Rule 12(c) motion is governed by the same standards as a motion to dismiss under Rule 12(b) (6). Craigs, Inc. v. General Electric Capital Corp., 12 F. 3d 686, 688 (7th Cir. 1993). A court should not grant such a motion unless it appears beyond doubt that a plaintiff cannot prove any facts that would support his claim for relief, and that the movant is entitled to judgment as a matter of law. Id.; National Fidelity

Life Ins. Co. v. Karaganis, 811 F.2d 357, 358 (7th Cir. 1987). A court considers only the matters presented in the pleadings and must view the facts in the light most favorable to the non moving party. National Fidelity Life Ins. Co., 811 F.2d 358. For purposes of the motion, all well-pleaded allegations of the complaint must be taken as true. Wolfolk v. Rivera, 729 F. 2d 1114, 1116 (7th Cir. 1984).

## II. STATEMENT OF FACTS

Bank One concedes the following factual allegations for purposes of its motion. Plaintiff is a domiciliary of the Republic of Spain. Bank One is an Indiana corporation with its principal place of business in Indianapolis, Indiana. In February 1990, Plaintiff closed out a number of accounts with Bank One, including an account which he held jointly with one Antonio Ferrari ("Ferrari "). In June 1990, Ferrari fraudulently reactivated the account which he previously had held jointly with Plaintiff. Between June 28, 1990 and August 13, 1990, Ferrari transferred a total of $1,259,779.14 belonging to Plaintiff from Plaintiff's account with Banca Nazionale del Lavoro, an Italian bank registered to do business in Florida ("BNL"), to the reactivated account at Bank One. On August 4, 1992, Plaintiff requested that BNL deliver a statement reflecting all of Plaintiff's accounts. Shortly thereafter, Plaintiff commenced an action in state court in Dade County, Florida, Case No. 92-23709 CA-25, entitled Jean Pierre Frey v. Banca Nazionale Del Lavoro and Antonio Ferrari. On September 20, 1993, during depositions in the above-referenced state action, Plaintiff learned that Bank One had failed to follow its own procedures when

it reactivated the joint account and that if Bank One had followed its procedures it would not have accepted the fraudulent transfer from BNL.

Plaintiff filed his action against Bank One on September 27, 1994, alleging that Bank One was negligent in failing to detect the fraudulent transfer by Ferrari of Plaintiff's funds. Plaintiff seeks a total of $1,611,966.43 in compensatory damages and interest. Bank One has filed a motion for judgment on the present cause of action within two years after the cause of action accrued, as required of all tort claims for injury to personal property under Indiana Code section 34-1-2-2(1).

## III. DISCUSSION

The question before the Court is whether Plaintiff's action is barred by Indiana's statute of limitations, as codified in Indiana Code section 34-1-2-2(1). In diversity suits, a federal court must apply the substantive law of the forum in which it sits, including the forum state's statutes of limitations. Walker v. Armco Steel Corp., 446 U.S. 640, 745, 100 S. Ct. 1978, 1982-83 (1980); Guaranty Trust Co. of New York v. York, 326 U.S. 99, 109, 65 S.Ct. 1464, 1470 (1945); Hildebrand v. Hildebrand, 736 F. Supp. 1512, 1516-17 (S.D. Ind. 1990). Therefore this Court looks to Indiana's statutes of limitations and the case law interpreting them to resolve the matter before this Court.

Indiana courts view statutes of limitations favorably, recognizing that while such statutes occasionally work an injustice, they "rest upon sound

policy, and tend to the peace and welfare of society." Shideler v. Dwyer, 275 Ind. 270, 417 N.E. 2d 281, 291 (1981). Plaintiff's negligence claim against Bank One is a tort claim based on injury to personal property must be brought within two years after the cause of action accrues. Indiana Code section 34-1-2-2 states in pertinent part:

> The following actions shall be commenced within the periods herein described after the cause of action has accrued, and not afterwards:
>
> (1) For injuries to person or character, for injuries to personal property, and for a forfeiture of penalty given by statute, within two [2] years.
>
> ***

Ind. Code § 34-1-2-2 (1). The Indiana Supreme Court has noted that while the legislature specified the time within which an action must be brought, the legislature "left to the courts the responsibility of determining when the cause accrues." Burks v. Rushmore, 534 N.E. 2d 1101, 1103 (Ind. 1989). See also Barnes v. A.H. Robins Co., Inc. , 476 N.E. 2d 84, 86-87 (Ind. 1985) (same).

The Indiana Supreme Court traditionally has held that a cause of action accrues "when the resultant damage is 'susceptible of ascertainment.'" Wehling v. Citizens National Bank, 586 N.E. 2d 840, 842 (Ind 1992) (quoting Montgomery v. Crum, 199 Ind. 660, 161 N.E. 251, 259 (1928)). Beginning with Barnes v. A.H. Robins Co., Inc., 476 N.E. 2d 84 (Ind. 1985), a

product liability action involving an intrauterine contraceptive device, the high court has recognized a so-called discovery rule. The court held that the statute of limitations "commence[d] to run from the date the plaintiff knew or should have discovered that she suffered an injury or impingement, and that it was caused by the product or act of another." Id. at 87-88. While the Barnes opinion was limited to the precise facts of the case, thereafter courts gradually extended the application of the discovery rule to other types of cases. See Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg and Feldman Fine Arts, Inc., 917 F. 2d 278, 288 (7th Cir. 1990) (citing cases). This process culminated in Wehling v. Citizens National Bank, 586 N.E. 2d 840 (Ind 1992), in which the Indiana Supreme Court held that, as a general rule, "the cause of action of a tort claim accrues and the statute of limitations begins to run when the plaintiff knew or, in the exercise of ordinary diligence, could have discovered that an injury had been sustained as a result of the tortious act of another." Id. at 843.

As the Seventh Circuit recently noted in Horn v. A.O. Smith Corp., 50 F. 3d 1365, 1369 n.7 (7th Cir. 1995), the Wehling court considered its newly articulated rule to have merged Indiana's traditional "ascertainment" rule and the emerging discovery rule. see Wehling, 586 N.E. 2d at 843. This Court thus looks to the rule as set out in Wehling to be controlling. That rule has two components -- the discovery of their jury and the discovery of its cause. See Horn v. A.O. Smith Corp., 50 F. 3d 1365, 1369 (7th Cir. 1995).

There is no doubt that Plaintiff discovered his injury in this case in August 1992, when he received his account statement. The question before the Court is whether Plaintiff also discovered the cause of his injury at that time or only in September 1993, during the depositions of Dickinson and Akers. Despite the fact-specific nature of this inquiry, the point at which a cause of a action accrues may be determined as a matter of law, if the relevant facts are undisputed and they lead to but one conclusion. Id. at 1370.

Bank One contends that Plaintiff's cause of action against it is barred as a matter of law because, as of August 1992, Plaintiff knew or, in the exercise of ordinary diligence, could have discovered Bank One's alleged negligent acts or omissions. The Court agrees. In the instant case, Plaintiff was fully capable of investigating the circumstances attending Ferrari's conversion of the funds from the BNL account, of discovering any alleged negligence on the part of Bank One, and of bringing an action against Bank One within two years of learning that he had been monetarily injured. The Court finds that Plaintiff had notice of his monetary injury and its causation in August 1992, when Plaintiff, at the very least, knew (1) that Bank One had accepted unauthorized wire transfers of more than one million dollars from his BNL account (Complaint ¶7); and (2) that Bank One had deposited these wired funds in an old account of his which he believed to have been closed since 1990 (Complaint ¶4). The Court finds that had Plaintiff exercised ordinary diligence, he would have discovered the information necessary to bring the instant cause of action against Bank One, based on the facts available to him on August 4, 1992, the date he received the

statement as to all of his accounts. Where a party learns that more than a million dollars has been transferred out of his account at one bank and deposited into an account at a second bank, which account the party believed he had previously closed, the party has notice, as a matter of law, that both banks may have breached a duty of care which they owed to him.

Plaintiff contends, however, that his cause of action accrued no earlier than September 20, 1993. In his Complaint, Plaintiff alleges that "the deposition of Ruth A. Dickinson, vice president of Bank One, revealed that Bank One had failed to follow its own procedures as to the joint account and that these procedures, if followed, would have prevented the fraudulent transfer of Mr. Frey's money." (Complaint ¶8) Plaintiff also contends in his response brief to Bank One's motion that "[i]t was during the course of the depositions of Jacqueline Akers and Ruth Dickinson on September 20, 1993 that Plaintiff first learned that Bank One had violated some of its own internal procedures in handling the transfer which aided and permitted Antionio Ferrari in the perpetration of his fraud." (Brief in Response To Bank One's Motion For Judgment On The Pleadings at 1-2) On its face, Plaintiff's contention does not reach the issue of when, in the exercise of ordinary diligence, Plaintiff should have known of the bank's alleged negligent behavior. Instead, Plaintiff's contention speaks only to the issue of when he actually knew he had a potential cause of action against Bank One. In Wehling, however, the Indiana Supreme Court held that a cause of action accrues when a plaintiff "knew or, in the exercise of ordinary diligence, could have discovered" that he had

been injured. Wehling v. Citizens National Bank, 585 N.E. 2d 840, 843 (Ind. 1992) (emphasis added).

There is nothing in the wording of Wehling that supports Plaintiff's contention that his claim against Bank One did not accrue until he had specific evidence of the bank's negligence. Instead, the Indiana Supreme Court only requires that a party be sufficiently aware of his or her injury to enable the party to investigate the injury and its causation. In Barnes the Indiana high court noted the purpose of the discovery rule is to give a plaintiff "a fair opportunity to investigate available sources of information and to decide whether to bring [his] claim in court within the time limitations in the statute." Barnes, 476 N.E. 2d at 88. Under the holding in Wehling, a cause of action accrues not when the plaintiff knows the precise legal theory of evidence it ultimately will use a t trial, but rather when the party knows that it has sustained injury "as a result of the tortious act of another." Wehling, 586 N.E. 2d at 843 (emphasis added). Cf. Miller v. A.H. Robins Co., Inc. 766 F.2d 1102, 1105 (7th Cir. 1985) ("the notion of 'a fair opportunity to investigate' suggests that discovering 'the cause' is something less that possessing irrefutable proof of causation"); Hildebrand v Hildebrand, 736 F. Supp. 1512, 1518 n.17 (S.D. Ind. 1990) (statute of limitations begins to run when a plaintiff "has or should have discovered some evidence" of the potential claim").

As the Court has already noted, Plaintiff is deemed to have had constructive knowledge of any negligence on the part of Bank One as of August 1992, when he first learned of the removal of funds from his BNL account. However, Plaintiff did not bring his

claim against Bank One until September 27, 1994, more than four years after the alleged fraudulent transactions occurred, and more than two years after he had requested the statement from BNL as to all of his accounts. If Plaintiff's initial lawsuit against BNL in Florida state court had been unusually protracted, Plaintiff might not have deposed Bank One personnel for years. To permit a plaintiff to bring a cause of action against a party based on an injury of which he had notice several years before would defeat the very purpose of a statute of limitations.

Plaintiff's factual contentions are also unpersuasive. In conjunction with his response brief, Plaintiff has submitted excerpts from the transcripts of the September 20, 1993 depositions of Akers and Dickinson which, Plaintiff contends, supplied him with information that revealed to him Bank One's negligence. See Brief in Response to Bank One's Motion for Judgment On The Pleadings, Exhibits 1 and 2. To satisfy the requirements of Indiana law, Plaintiff must establish that these depositions supplied him with information without which, in the exercise of ordinary diligence, he would not have known that Bank One was guilty of negligence. The excerpted transcripts reveal no discernible increase in the quality or quantity of information available to Plaintiff which would support his contention that his cause of action against Bank One was "revealed" to him only at the time of those depositions.

For example, the excerpted portions of the Dickinson deposition disclose that Bank One's alleged negligence stemmed from its decision to accept for deposit into Plaintiff's BNL account, where the wire

transfer instructions, which listed the Bank One account number and the name of the account holder, transposed Plaintiff's first name and middle name. Dickinson testified that where an incoming wire transfer correctly lists an account number and lists the name of the account holder but transfers or to reject the transfer because of the irregularity. (Resp. Brief, Exhibit 2 at 34) Dickinson further testified that Bank One had no absolute policy on whether to accept wire transfers containing such transpositions. (Id. at 36) According to Dickinson, before Bank One would accept a wire transfer for a closed account. (Id. at 57) The Court finds nothing in Dickinson's testimony that suffices to provide Plaintiff with information which he otherwise could not have discovered had he exercised ordinary diligence after learning of the alleged conversion of his BNL funds. With ordinary diligence, Plaintiff would have been able to proceed with his cause of action against Bank One before the information at the deposition was "revealed" to him. Plaintiff's cause of action against Bank One accrued on August 4, 1992. The filing of the Complaint on September 27, 1994 is too late. The cause, accordingly, is time-barred.

## IV. CONCLUSION

For the foregoing reasons, the Court finds that Plaintiff has failed to comply with Indiana's statute of limitations, pursuant to Indiana Code section 34-1-2-2(1). Therefore, the Court grants Bank One's motion for judgment on the pleadings.

**It is so ORDERED this 16th day of November 1995.**

**SARAH EVANS BAKER,**
**CHIEF JUDGE**
**United States District Court**
**Southern District of Indiana**

# United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

August 28, 1996

RICHARD D. CUDAHY, *Circuit Judge*

MICHAEL S. KANNE, *Circuit Judge*

DIANE P. WOOD, *Circuit Judge*

JEAN PIERRE FREY,
*Plaintiff-Appellant,*

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division

No. 95-3981

*v.*

No. 94 C 1432

BANK ONE,
*Defendant-Appellee.*

Sarah Evans Barker, *Chief Judge*

ORDER

On consideratin of the petition for rehearing filed in the above-captioned case, all of the judges on the original panel have voted to deny the petition for rehearing.

IT IS ORDERED that the petition for rehearing is hereby DENIED.

**United States District Court**
**Southern District of Indiana**
**Indianapolis Division**

**JEAN PIERRE FREY,**
***Plaintiff,***

***vs.***

**BANK ONE, N.A., an Indiana corporation**
***Defendant.***

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**Michael C. McKinnon (P41362)**
**50 West Big Beaver Road**
**Suite 400**
**Troy, Michigan 48084**
**810/740-9860**

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**COMPLAINT and JURY DEMAND**

**NOW COMES the Plaintiff, JEAN PIERRE FREY, by and through his attorneys, REYNOLDS, BEEBY & MAGNUSON, P.C., and his Complaint against Bank One, Indianapolis, N.A., states as follows:**

## COMMON ALLEGATIONS

1. Jean Pierre Frey is an individual who is domiciled in and conducts business in the Republic of Spain.

2. Bank One, Indianapolis, N.A., (hereinafter referred to as "Bank One") is an Indiana corporation with its principal place of business in Indianapolis, Indiana.

3. The amount in controversy exceeds the sum of Fifty Thousand (450,000.00) Dollars exclusive of interest and costs.

4. In February of 1990, Plaintiff, Jean Pierre Frey, closed out a number of accounts with Bank One, including an account which he held jointly with Antonio Ferrari, and effectively ended his relationship with Bank One.

5. Sometime in June of 1990, Antonio Ferrari fraudulently reactivated the account which he had jointly held with Mr. Frey.

6. Between June 28, 1990 and August 13,1990, Antonio Ferrari, by fraudulent means, transferred a total of $1,259,779.14 belonging to Mr. Frey from Mr. Frey's accounts with the Banca Nazionale del Lavoro (BNL) to Bank One. [BNL is an Italian bank registered to do business in the State of Florida which does business in Miami.]

7. On August 4,1992, Jean Pierre Frey requested that BNL deliver statement as to all of Mr. Frey's accounts. Shortly the Eleventh Judicial Circuit in and for Dade County, Florida, Case No. 92-23709 CA-25, entitled, Jean Pierre Frey v. Banc Nazionale del Lavoro and Antonio Ferrari.

8. During the course of this suit, depositions were taken of several bank One employees. On September 20, 1993, the deposition of Ruth A. Dickinson, vice president of bank One, revealed that bank One had failed to follow its own procedures as to the joint account and that these procedures, if followed, would have prevented the fraudulent transfer of Mr. Frey's money.

## I. NEGLIGENCE

9. Plaintiffs realleges paragraphs 1 through 8 of the Common Allegations as though fully set forth herein.

10. Defendant, Bank One, negligently failed to follow its own internal operating procedures regarding money transfers and joint account which would have prevented the fraudulent act of Antonio Ferrari.

11. Defendant, Bank One, failed to act with reasonable diligence in failing to detect the fraudulent acts of Antonio Ferrari.

12. The above mentioned negligent actions have damaged Plaintiff, Frey, in that he has been deprived of $1,259,779.14, as well as $352,187.29 in interest income, for a total loss of $1,611,966.43

WHEREFORE, Plaintiff, JEAN PIERRE FREY, prays for judgment against the Defendant in the amount to which he is found to be entitled, together with costs, interest and attorney fees.

## JURY DEMAND

Plaintiff, JEAN PIERRE FREY, by and through his attorneys, REYNOLDS, BEEBY & MAGNUSON, P.C., hereby demands trial by jury in the above captioned matter.

**REYNOLDS, BEEBY &**
**MAGNSON, P.C.**

**By:_____**
**Michael C. McKinnon (P41362)**
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**Dated 9/26/94**

United States District Court
Southern District of Indiana
Indianapolis Division

| | | |
|---|---|---|
| JEAN PIERRE FREY, *Plaintiff,* | ) | |
| *vs.* | ) | Civil Action No: IP94-1432C |
| BANK ONE, N.A., an Indiana corporation *Defendant.* | ) | |

**ANSWER**

Defendant, Bank One, Indianapolis, N.A.("Bank One"), answers the Plaintiff's Complaint and Jury Demand ("Complaint") as follows:

**First Defense**

1. Bank One is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 1 of the Complaint.

2. Bank One denies the allegations of paragraph 2 of the Complaint, except that Bank One admits that Bank One is a national banking association with its principal place of business in Indianapolis, Indiana.

3. Bank One admits the allegations of paragraph 3 of the Complaint.

the allegations of paragraphs 4 through 7 of the Complaint.

8. Bank One denies the allegations of the first sentence of paragraph 8 of the Complaint, except that Bank One admits that during a previous lawsuit, depositions were taken of Ruth Dickinson and Jacqueline Akers. Bank One denies the allegations of the second sentence of paragraph 8 of the Complaint.

9. Bank One incorporates by reference its responses to paragraphs 1 through 8 of the Complaint.

10-12. Bank One denies the allegations of paragraphs 10 through 12 of the Complaint and denies all other allegations not expressly admitted in this Answer.

## Second Defense

The complaint fails to state a claim upon which relief may be granted.

## Third Defense

The plaintiff's claim are barred by the statute of limitations.

## Fourth Defense

The plaintiff's claims are barred by the doctrine of waiver.

## Fifth Defense

The plaintiff's claims are barred by the doctrine of estoppel.

Fifth Defense

The plaintiff's claim are barred by the doctrine of estoppel.

Sixth Defense

The Plaintiff's claim are barred, or the damages recoverable by plaintiff are proportionately diminished by principles of comparative fault, to the extent the damages were proximately caused by: (1) the negligent, reckless or intentional acts or omissions of third persons of third persons or entities; and/or (2) the negligent, reckless or intentional acts of the plaintiff.

WHEREFORE, Bank One prays that plaintiff take nothing by his Complaint, and that defendant be awarded its costs in this action and have all other just and proper relief.

BAKER & DANIELS

Supreme Court, U. S.
FILED
JAN 8 1997
CLERK

No. 96-920

In The

# Supreme Court of the United States

October Term, 1996

JEAN PIERRE FREY,

*Petitioner,*

v.

BANK ONE, INDIANAPOLIS, N.A.,
an Indiana corporation,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit**

## RESPONDENT'S BRIEF IN OPPOSITION

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## LIST OF PARTIES

The petitioner is Jean Pierre Frey ("Frey"). The respondent is Bank One, Indianapolis, N.A. ("Bank One"), a national banking association. Bank One's parent corporation is Banc One Indiana Corporation. Banc One Indiana Corporation is wholly owned by Banc One Corporation.

## STATEMENT OF THE CASE

For purposes of this appeal, Bank One accepts the statement of the case in the Petition for Writ of Certiorari ("Petition"). However, the petitioner has omitted the following material facts:

The allegedly fraudulent transfers from Bianca Nationale del Lavoro ("BNL") to Bank One occurred between June 28, 1990, and August 13, 1990. Complaint, ¶ 6 (Petition at 20a). On August 4, 1992, Frey requested that BNL provide him with a statement regarding all of his accounts. *Id.*, ¶ 7 (Petition at 20a). At this time, he learned of the allegedly fraudulent transfers to Bank One. Appellant's Brief at 6. Shortly thereafter, Frey commenced an action against Ferrari and BNL in Dade County, Florida. Complaint, ¶ 7 (Petition at 20a).

## REASONS FOR DENYING THE PETITION

In this diversity case, petitioner asserts negligence claims under Indiana law based on Bank One's alleged mishandling of wire transfers in 1990. The District Court dismissed the petitioner's complaint on the grounds that petitioner's claims are barred by Indiana's two-year statute of limitations. The Court of Appeals for the Seventh Circuit affirmed this dismissal in an unpublished opinion. Nothing in the unpublished opinion warrants exercise of this Court's plenary review.

The petitioner does not suggest that the Court of Appeals erroneously decided an important question of federal law or even that the decision created a conflict

between state and federal law. Instead, the petitioner argues that the decision was wrong *under the facts of this case. E.g.*, Petition at 8 ("the Court has not given consideration *to the fact* that Bank One's negligent act was neither known to Mr. Frey, nor was it ascertainable . . . until it was actually discovered . . . . " (emphasis added)). Even assuming that the Court of Appeals made a factual error in deciding this issue of Indiana law, such an error does not justify certiorari review. *See e.g., Haring v. Prosise*, 462 U.S. 306, 314 n. 8 (1983) ("a challenge to state law determinations by the Court of Appeals will rarely constitute an appropriate subject of this Court's review"); *United States v. Johnson*, 268 U.S. 220, 227 (1925) ("we do not grant certiorari to review evidence and discuss specific facts").

In any event, the decision of the Court of Appeals was the correct one. Under Indiana law, the two-year statute of limitations for negligence claims begins to run "when the plaintiff knew or, in the exercise of ordinary diligence, could have discovered that an injury had been sustained as a result of the tortious act of another." *Wehling v. Citizens National Bank*, 586 N.E.2d 840, 843 (Ind. 1992); Petition at 1. Applying this standard to the undisputed facts, it is clear that this action is time-barred.

Petitioner admits that the transactions that are the subject of this action occurred between June and August 1990. Petition at 5. He further admits that he learned of his alleged injury in August of 1992 – more than two years before he filed his Complaint against Bank One. Appellant's Brief at 6. Despite these admissions, petitioner contends that his claim is not time-barred because

he did not discover what he believes to be evidence of Bank One's negligence until 1993. *Id.* at 5, 8.

The Court of Appeals properly rejected this argument. Indiana's statute of limitations is triggered by *notice*, not actual knowledge, of an injury and causation. *Wehling*, 586 N.E.2d at 843. Frey had notice of Bank One's alleged negligence no later than August of 1992. At that time, Frey knew that Bank One had (by his theory) accepted unauthorized wire transfers of more than one million dollars. Complaint, ¶ 7 (Petition at 20a). He also knew that Bank One had placed the transferred funds in an account that he claims had been closed *since 1990. Id.*, ¶ 4 (Petition at 20a). This information was sufficient to alert him that he needed to investigate any potential claim against Bank One and to bring suit within the statutory period.

## CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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